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IN THE

Supreme Court of the United States

STATE OF TENNESSEE,
Petitioner,

vs.

GEORGE LANE, BEVERLY JONES, and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BLANCHE FISCHER FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Blanche Fischer Foundation is a private, nonprofit 501(c)(3) charitable organization founded in 1981 from a trust established by the late Blanche Fischer, a native of Long Creek, Oregon. It makes direct grants on behalf of individuals with physical disabilities. The aid may relate directly to the disability or may less directly foster independence. In its first 21 years, the Blanche Fischer Foundation awarded nearly $1.2 million to over 2,100 individual Oregonians with physical disabilities. It is one of a few foundations in the United States that makes grants on behalf of individuals.

The Executive Director, John P. Dziennik, has governor's appointments to the Oregon State Rehabilitation Council and to the State Independent Living Council and was elected vice chair of that organization in late summer 2002. At the national level, he is treasurer of Disability Funders Network, which is committed to disability advocacy and rights. It has been the personal experience of the Foundation's staff, board, and grantees that use of the Americans with Disabilities Act ("ADA") fosters physical and financial independence for those previously excluded or marginalized due to discrimination on the basis of their disability. The Foundation supports the position of Mr. Lane, Ms. Jones, and the United States Solicitor General in this matter, and has obtained consent of the parties to file this brief.

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[1] No counsel for any party authored this brief in whole or in part and no person or entity other than amicus, their members, and their counsel have made monetary contributions to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) ("Garrett"), this Court noted that the record before it at that time failed to show a history of invidious discrimination against the disabled. The purpose of the Blanche Fisher Foundation in submitting this brief is to assist in fleshing out the record before this Court as to the existence of state support for discrimination against the disabled in the years prior to passing of the ADA. Same shows that the record absent in *Garret, supra,* does in fact exist, and in abundance.

There is a long and sordid history of discrimination against the disabled in this country. Action by governmental entities to discriminate against the disabled is apparent from decades of case law and continues through both subtle and vulgarly open means. To find for the state of Tennessee in this matter would necessitate a finding that Congress desired to permit this conduct to continue unabated. But the findings of Congress preceding the adoption of the ADA as reflected in its record on the ADA and prior statutes designed to remedy discrimination against the disabled show a far, far different intent. It is the purpose of this brief to highlight the record of discrimination existing at the time Congress passed the ADA, which it recognized was one of the most significant pieces of civil rights legislation in the history of this country.

ARGUMENT

1. BIPARTISAN RECOGNITION OF HISTORICAL DISCRIMINATION AND THE EXTRAORDINARY NATURE OF THE ADA

In passing the ADA, Congress specifically found that "historically, society has tended to isolate and segregate individuals with disabilities . . . ," "individuals with disabilities continually encounter various forms of discrimination, including ***outright intentional exclusion*** . . ." (emphasis added) . . . "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . ." 42 U.S.C. § 12101. Such findings are amply supported by instances cited below, showing of exclusion of the disabled from the courtroom, or restrictions on their appearance therein. Such exclusions are sadly common as dirt in the history of this country.

2. EXCLUSION OF THE DISABLED FROM THE COURTROOM

The idea that even viewing a disabled person might be too much for some is the usual ground for exclusion of disabled persons from their own trials, and such exclusion occurs in state and federal courts. California has ignored the ADA and still permits its courts to bar the disabled from their own trials where their appearance might be unpleasant to a jury. In *Province v. Center for Women's Health and Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667 (Cal. 1993) *rev. denied* (1994 Cal. LEXIS 1190), the Court held that a "physically disfigured" plaintiff was properly barred from entering the courtroom for her own trial because her disability

might upset jury members. *Accord, Whitfield v. Roth,* 10 Cal.3d 874, 896, 112 Cal. Rptr. 540 (Cal. 1974), footnote 27 - upholding bar of paralyzed plaintiff from jury's presence for more than ten minutes merely because plaintiff was in a wheelchair.

In *Carlisle v. County of Nassau*, 64 A.D.2d 15, 505 N.E.2d 64 (N.Y. 1978) a trial court barred a paralyzed plaintiff on the same basis, although the Court of Appeal reversed. In *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526 (Minn. 1964), a Minnesota Court of Appeal upheld complete exclusion of the disabled plaintiff from the court during trial. In *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. 1987) exclusion of the disabled plaintiff during the liability phase of trial was upheld because the sight of disability might influence the jury. This case was overruled in *Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002), which recognized that exclusion of the disabled from the courtroom was questionable after the ADA's passage, but ultimately relying on Indiana's constitutional right to be present at trial. Oregon, a state which regards emotional trauma as a grounds for sterilization (see below), continued to allow its courts to exclude the disabled from the courtroom at certain stages of trial, even after the ADA passed. *Bremner v. Charles*, 312 Ore. 274, 821 P.2d 1080 (Ore. 1991).

Federal courts also practiced discrimination against the disabled by barring them from court prior to the passage of the ADA. See *In re Richardson-Merrell, Inc. Bendectin Products*, 624 F. Supp. 1212 (S.D. Ohio 1985) – sight of the disabled might so upset a jury the members would lose ability for rational thought. *Accord, Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), relied upon by the overruled *Gage v. Bozarth* court, *supra.*

Such discrimination was cited by members of Congress on the record when adopting the ADA: "[F]amilies with a member who is mentally retarded have been refused service in a restaurant because the owner fears that other customers might be offended or uncomfortable eating near that family. Yet, such a practice is not only common, it is perfectly legal." 136 Cong. Rec. S9684, S9692 (daily ed. July 13, 1990) (statement by Sen. Chafee).

The idea that the disabled were distasteful or frightful to view, and should hide themselves away to make life more pleasant for "normal" people was one of the ideas that Congress wanted to smash by passing the ADA. Exclusion of the disabled from jobs and even courtrooms was seen as a cause of discrimination in and of itself. A society that was used to seeing the disabled going about their business, at work, at courts, or at play, was far more likely to find their inclusion in trials and on juries as part of the normal course of life.

Exclusion of Mr. Lane and Ms. Jones from the second floor of the Tennessee courthouse, unless subjected to the humiliation of being carried like a sack of potatoes, continues this dreadful legacy. Unless the disabled can go about their business as usual, and avoid being arrested merely because they demand a modicum of dignity, Congress' intent that the ADA foster the realization that the disabled were perfectly "normal" will be thwarted. It is the attitude that the disabled are somehow fundamentally "different" and therefore unworthy of inclusion, or to be forced into outright exclusion, that characterizes much case law in the past century. Such judicial opinion reflects the attitudes that Congress was insistent be corrected, as well as the strength with which prejudice against the disabled has held sway over our national conscience, even in the halls of justice.

3. JUDICIALLY-APPROVED GOVERNMENTAL DISCRIMINATION AGAINST THE DISABLED.

The disabled in the United States have been subjected to horrifying instances of the most vile discrimination by private and public entities. Discrimination against the disabled has also been approved even by the judiciary in days past. In *Regents v. Bakke*, 438 U.S. 265, 327 (1978), four of the Court's justices cited *Buck and Plessy v. Ferguson*, 163 U.S. 537 (1896), as showing the difficulty the judicial system has had in enforcing the Fourteenth Amendment where it collides with socially acceptable forms of discrimination against those perceived to be "others" "unlike us."

The Court is no doubt aware of the unfortunate history of the eugenics movement in the United States. Persons with disabilities have been so reviled that their right to exist or to have children, and consequently the right of those children to exist themselves, have not only been put into question by public debate, but actual sterilization forced upon them by government itself. See *Buck v. Bell*, 274 U.S. 200, 207 (1927), upholding state law coercing sterilization of epileptics and other "undesirable" Americans with disabilities, as a constitutional means of improving the population of our country. This is part and parcel of the "blatant and sometimes barbaric discrimination against individuals with disabilities" found by Congress to exist and persist at the time the ADA was adopted. 136 Cong. Rec. S9684, S9690 (daily ed. July 13, 1990) (statement by Sen. Metzenbaum). Strong words, but cruelly true words.

As of 1972, thirty-five states in the U.S. had statutes promoting sterilization of those with disabilities.

Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Penn. 1972). Eighteen years before the ADA was adopted, an Oregon Court of Appeals found there existed a permissible rational government interest in forced sterilization to prevent the birth of perfectly normal children just because they might require state assistance due to parental difficulties arising from disability. *Cook v. State*, 9 Ore. App. 224 (Or. 1972). The person to be sterilized there was a seventeen-year-old girl who suffered emotional problems due to a history of physical and sexual abuse, and was to be sterilized *solely* because of that abuse and its effect on her.

See also *In re Sterilization of Moore*, 289 N.C. 95, 103, 221 S.E. 2d 307 (1976), finding that the state's interest in limiting money for foster care and the like is sufficient justification to make a child a "wrongful life" merely due potential state savings by avoiding its birth: "The people of North Carolina also have a right to prevent the procreation of children who will become a burden on the State." Disability discrimination as a mere cost savings measure was alive and well when the ADA was passed.

Unfortunately, the belief that we can and should "breed" a "better" Amer[illegible]n and that the disabled are better off dead or never born in the first place is supported by surprising segments of our population. The use of government power, personnel, and public funds to foster this view is a far from uncommon circumstance today. For example, there is an organization in California affiliated with British eugenicist Christopher Brand[2] that advocates, and will pay a "reward"

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[2] Mr. Brand is the author of *The G Factor*, a book that espouses the eugenics cause and describes persons whose ancestry is more recently from the African continent as possessing the lowest IQs.

to, any current ***or recovered*** drug or alcohol addict who agrees to be sterilized, as "We don't allow dogs to breed. We spay them. We neuter them." Celia M. Vega, "Sterilization Offer to Addicts Reopens Ethics Issue," *New York Times*, January 3, 2003. This group (going by the acronym "CRACK") happily refers to assistance it receives from state government entities to further its eugenics program, such as parole officers, government-funded treatment programs, social workers, foster parent agencies, and hospitals. (*Id.*)

If successful, CRACK would have prevented two of our last four Presidents from being born, and regards our current President and other highly prominent Americans as "manifestly unfit to continue their kind" (*Buck, supra*, 274 U.S. at 207) due solely to the fact of their disability. Eugenicists fail to recognize the truth in the state motto of ADA-author and Kansan Robert Dole, "Ad Astra Per Aspera," Latin for "To the stars through Adversity." As a disabled veteran, Senator Dole is a prominent personal example of how disability can actually foster excellence, rather than hinder it.

Case law recognizes that those recovering from alcohol and drug problems are persons with disabilities under the ADA. But there is at least one law review article referring favorably to Chief Justice Holmes' words in *Buck* to support eugenics for the disabled. The article urges judicial enforcement of contracts for sterilization of the disabled, apparently through judicial orders of specific performance, as a cheaper method of dealing with disabilities than providing assistance to live a productive life. See Jennifer Mott Johnson, "Reproductive Ability for Sale, Do I Hear $200?" 43 Ariz. L. Rev. 205 (Spring, 2001). One hopes that public policy against such things as organ selling, baby selling, or contracts in restraint of marriage also displays a public policy against contracts for sterilization and will prevent

Ms. Johnson's vision of eugenic contract enforcement from becoming law.

But the fact remains that state employees continue to cooperate in coercing the disabled to undergo sterilization merely because future children might experience a possibility of disability or merely of disadvantageous parenting. See *Vaughn v. Ruoff*, 253 F.3d 1124 (8th Cir. 2001). That case denied immunity to the state employee involved: "The fundamental right involved must be safeguarded to assure that sterilization is not a subterfuge for convenience and relief from the responsibility of supervision." (*Id.* at 1131).

In 1985, this Court held state action discriminating against the developmentally disabled in zoning laws was permissible so long as there was a rational government interest involved. The Court found that the disabled were not entitled to "quasi-suspect classification" status requiring more rigorous review of state action. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). The record in the trial court showed a long and sorry history of discrimination: "Mental retardates have been segregated in remote, stigmatizing institutions . . . and when permitted in society, they have often been subjected to ridicule." *Cleburne Living Ctr. v. Cleburne*, 726 F.2d 191 (5th Cir. 1984). Only five years later, Congress decided such discrimination was in fact so odious that it passed the ADA.

Those disabled who were successfully put away from public view were found to be subjected to unconstitutional discrimination in *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979). The Court relied on governmental investigative reports showing that the functioning of the developmentally disabled could be greatly improved in their condition by treating them as normally as

possible given their individual levels of disability, citing B. Nirje, "The Normalization Principle, Changing Patterns in Residential Services for the Mentally Retarded," President's Committee on Mental Retardation (Rev. ed.1976).

Rather than treating the disabled with the same level of regard as for "normal" children, the state of Pennsylvania ensured that "the environment at Pennhurst is not merely inconsistent with normalization principles, but is actually hazardous to residents. Because of the inadequacies in programming attributable to staff shortages, residents were found to have lost skills already learned. Organized programs of appropriate education and training were found to be inadequate or unavailable." (*Id.* at 93.) Again, the short term cost figures were used as justification by the state, although the long-term cost of complete institutionalization (to segregate the disabled from society's view) is far greater.

In reaching its decision that such treatment was unconstitutional, the Court in *Halderman* was guided by Congress' findings of state discrimination and ill treatment of the disabled when it enacted the Developmentally Disabled Assistance and Bill of Rights Act in 1975, a full fifteen years before the ADA. 42 U.S.C. §§ 6001-6081. The legislative record for that Act notes that "Congress should reaffirm its belief in equal rights for all citizens including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded." (*Halderman, supra*, 612 F.2d at 96.)

Further, "Over the past few years, the horrifying conditions which exist in most of the public residential institutions for the mentally retarded and other

developmentally disabled persons have provided shocking testimony to the inhuman way we care for such persons." (*Id.* 105.) The finding that Congress intended to create substantive rights of action in favor of the disabled by the Act was reversed by this Court in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). With the ADA, however, Congress specifically provided for such remedies.

While disability is not a "suspect class," courts are not reluctant to find, in the face of reality, the immutable fact of discrimination against the disabled: "Although this court does not grant 'suspect class' status to the plaintiffs, it is acutely aware, from the evidence received at trial, of the extent to which the mentally retarded still suffer from some discrimination that is not related to actual disabilities." *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 490 (D.N.D. 1982). Congress also so found, for all disabled persons, as shown below.

4. THE CONGRESSIONAL RECORD SHOWS KNOWLEDGE OF THE LEGACY OF FEAR AND PREJUDICE – AND A RESOLVE TO STOP IT

> "Unfortunately, the findings that Congress made during the extensive hearings held on this bill have not changed for generations. People with disabilities have encountered various forms of discrimination – from outright exclusion to overprotective rules to attitudinal, architectural, transportation, and communications barriers. People with disabilities have experienced a history of unequal treatment and have formed insular

> groups, segregated from the rest of society."
>
> 136 Cong. Rec. E1913, E1913 (ext. of remarks, June 13, 1990) (statement by Rep. Hoyer.)[3]

A national history of discrimination against the developmentally disabled, and against those with cancer, based on irrational fears that such might be "contagious" resulted in segregation and shunning of afflicted individuals. 136 Cong. Rec. S 7422, S7441 - S7442 (daily ed. June 6, 1990) (Letter from Affiliated Leadership League of and for the Blind and nearly 80 other organizations).

Shortly after the ADA was adopted, then President Bush wrote to Congress advising of his position on that act: "Discrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose. That requires rigorous enforcement of existing antidiscrimination laws. It also requires vigorously promoting new measures such as this year's Americans with Disabilities Act, which for the first time adequately protects person with disabilities against invidious discrimination." 136 Cong. Rec. S16562, at S16562 (daily ed. Oct. 24, 1990) (Letter from Pres. George W. Bush).

The President placed the ADA among past civil rights legislation which abrogated 11th Amendment immunity, and

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[3] Relying on Louis Harris & Associates, "The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream" (1986); "Implications for Federal Policy for the 1986 Harris Survey of Americans with Disabilities" (1988).

stressed that such legislation had always been the product of admirable and broad bi-partisan efforts in Congress: "The Civil Rights Restoration Act, the Fair Housing Amendments Act, the Americans with Disabilities Act – none would be law today if it were not for the leadership of Republican as well as Democratic Senators." (*Id.* at S16563.)

The extraordinary rate of unemployment and discrimination against the disabled was reviewed through outside studies when Congress decided on means to implement the ADA. 136 Cong. Rec. S18123, S18127 (daily ed. Oct. 25, 1990) (statement of Sen. Simon). The existence of entrenched discriminatory attitudes, by private parties and by government entities, was recognized by Congress as the primary reason the ADA was needed:

> "For generations, society has viewed people with disabilities as citizens in need of charity. Through ignorance, we tolerated discrimination and succumbed to fear and prejudice. But our paternalistic approach did no more to improve the lives of people with disabilities than labor laws restricting women in the workplace did to protect women. Today we are shedding these condescending and suffocating attitudes – and widening the door of opportunity for people with disabilities. . . . '[E]qual justice under the law' is not a privilege – but a fundamental birthright in America."
>
> 136 Cong. Rec. S9680 at S9680 (daily ed. July 13, 1990) (ADA Conference Report, statement of Sen. Kennedy).

House members were swayed by the pervasiveness of discrimination against the disabled to vote in favor of the ADA. Representative Owens spoke extensively and eloquently of studies showing discrimination against those with HIV infections and sickle cell anemia, as well as the growing use of genetic testing, as a basis for his vote in favor of the ADA: "This Legislation will enable us to begin to make significant inroads in the legacy of disability discrimination in our country." 136 Cong. Rec. H4614, H4622-H4623 (daily ed. July 12, 1990) (statement by Rep. Owens.) One such study, "Epidemic of Fear," published in 1990 by the ACLU AIDS Project, was also cited by Rep. Edwards as showing the need for a law barring discrimination against those disabled or perceived to be medically or otherwise "unfit" when they were not. (*Id.* at H4624.)[4]

Senator Kennedy noted the genesis of the ADA in President Reagan's National Council on Disability and its 1988 report, "Towards Independence." That report, in turn, specifically discussed the depth of discrimination faced by the disabled, noting that international studies showed the disabled

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[4] Astoundingly, a House member speaking just prior insisted that AIDS is spread by food and voiced outrage that "homosexuals" or others with HIV infections were not omitted from the definition of "disabled." The Secretary of Health and Human Services noted there was no such risk. See 136 Cong. Rec. S9519, at S9519 - S9520. (daily op. July 11, 1990) (Letter from Louis Sullivan.) The Congressman's comments are proof that prejudice continues to overcome science where disability is concerned. Other members of Congress pointed out such problems as the very reason the ADA was needed: "[I]t does much to deal with the mental concepts that have captured the minds of too many people in our society. As a result of ignorance, such mindsets have brought about the kind of disability related discrimination that has limited people with disabilities in so many ways and has prevented them from realizing their true potential." 136 Cong. Rec. S9527, S9530 (daily op. July 11, 1990.) (statement by Sen. Kennedy.)

were faced with both the "physical barriers" to entry into public and business facilities as well as "social barriers," disregard for their abilities or needs, as faced by Mr. Lane and Ms. Jones in this matter. (*Id.* at p. 8.) For this reason, the Council urged that a broad anti-discrimination law be passed, which "should also include an obligation to remove architectural, transportation, and communication barriers . . ." for the disabled. (*Id.* at p. 19.) The ADA was the result.

"Based on testimony and comments from hundreds of people with disabilities, parents, and others, the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." 135 Cong. Rec. S10765, S10792 (daily op. Sept. 7, 1989) (statement by Sen. Biden.) Further, "The severity and pervasiveness of discrimination against people with disabilities is well-documented." 134 Cong. Rec. H2894, at H2894 (daily op. May 3, 1988) (statement by Rep. Owens.)

"Bringing Disabled Americans into the Mainstream," a nationwide poll conducted in 1986 by Louis Harris and Associates, underscores the conclusion that discrimination is a problem that people with disabilities frequently experience. Persons polled identified a variety of types of discrimination they had experienced, including workplace discrimination, denials of life and health insurance, denials of educational opportunities, lack of access to public buildings and public bathrooms, the absence of accessible transportation, and various forms of social rejection (others shying away or feeling sorry for them). This report was cited by Congress in deciding to adopt the ADA. 135 Cong. Rec. S4984, S4985 (daily op. May 9, 1989) (statement by Sen. Harkin).

Senator Hatch pointed to the history of discrimination as justification for the ADA: "For too long the valuable resources available to this Nation from individuals with disabilities have been wasted needlessly. Why? Because of senseless discrimination, intended or not, which subjected persons with disabilities to isolation and robbed America of the minds, the spirit, and the dedication we need to remain a competitive force in worldwide economy." 136 Cong. Rec. S9684, S9685 (daily ed. July 13, 1990) (statement by Sen. Hatch).

The historical and Congressional record demonstrates a lengthy history of discrimination, and a Congress unified across party lines to bring it to a complete halt, where ever it might occur, including where it was perpetrated by a state governmental entity.

5. CONCLUSION

The ADA is nothing more than Congress' continued and fully factually supported findings over the course of decades that the disabled are the subject of egregious discrimination by state entities. Its decision to afford private individuals substantive rights was made in the face of continuing discrimination despite its past findings and acts addressing specific groups of disabled people.

Thus, the question in this case is not whether or not there exists a record of discrimination against the disabled. Rather, the question is whether or not we will honor Congress' desire that the disabled be given full civil rights and the ability to enforce them against recalcitrant government entities that continue to bar them from full participation in American life. For the reasons stated herein, the Blanche Fischer Foundation submits that the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Dated: November 11, 2003.

Respectfully submitted,

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